

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

UNITED STATES OF AMERICA

v.

Case No. 8:03-CR-77-T-30TBM

HATEM NAJI FARIZ

**DEFENDANT FARIZ' REPLY TO GOVERNMENT'S RESPONSE TO FARIZ'
MOTION TO SUPPRESS**

The Defendant, Hatem Naji Fariz, by and through undersigned counsel, and pursuant to the Fourth Amendment to the U.S. Constitution, previously moved this Honorable Court to suppress the fruits of all evidence seized from Mr. Fariz, his home and place of employment pursuant to the February 19, 2003 search warrant. The government, on January 10, 2005, filed a written response to Mr. Fariz's motion. By leave of Court, Mr. Fariz files his reply to the government's response.

The government has raised a number of primary areas attacking Mr. Fariz's motion. These will be discussed in the order raised by the government.

Defendant Fariz's Standing

The government acknowledges Mr. Fariz standing to challenge the search at his residence at 1275 Farley Avenue, Spring Hill, Florida but refuses to concede his standing to challenge any other searches, particularly, his places of business.

The government goes to great lengths to describe those instances where an individual has been found to lack the necessary standing to challenge a search at his or

her place of business. They describe a corporate officer who had standing to challenge the search of his office, but not a storage area where he never spent any time working, *United States v. Britt*, 508 F.2d 1052 (5th Cir.) *cert. denied*, 423 U.S. 825 (1975); defendants who lacked standing because they were not officers, employees or shareholders, *United States v. Daily*, 921 F.2d 994 (10th Cir. 1990), *cert. denied*, 502 U.S. 952 (1991) and similar instances. Unless the government is conceding that the scope of their search exceeded that which was applied for by Agent Myers, their rendition of limiting precedent is inapplicable. The affidavit identifies the limitations on the scope of the search at Mr. Fariz's offices at 8355 Northcliffe Boulevard in Springhill, Florida to "Only defendant Hatem Naji Fariz's office, the internet computer and items contained therein will be searched and seized." The affidavit reiterates the limitations of the search and seizure as applicable to the office at 14540 Cortez Boulevard, Suite 116 with the express representation "Again, only defendant HATIM NAJI FARIZ's office, the internet computer, and items contained therein will be searched and seized." The very language of the application describes the requisite privacy interest necessary for standing to exist by excluding those areas and items not under the exclusive control of Hatem Fariz. The government has not, and cannot in good conscience, argue that the areas searched were not areas or items for which there existed no privacy expectation by Mr. Fariz. To the extent necessary, Hatem Fariz avers that the offices and items searched pursuant to the warrant were such that he and any other like-situated individual did and would have a reasonable expectation of privacy.

Legal Sufficiency of Warrants

Probable Cause

Franks v. Delaware, 438 U.S. 154 (1978) provides the proper standard for evaluating the validity of a search warrant in the face of factual misstatements made within the affidavit in support of a search warrant. That the instant affidavit contained materially false statements and referenced an indictment which asserted the same material false statements has been conceded by the government. Furthermore, Mr. Fariz has established facts that were or should have been known to the affiant prior to its submission to the magistrate judge for its “true and accurate” consideration¹.

Shortly after indicting Mr. Fariz in this matter, the government advised the court that it was aware that a conversation between Hatem Fariz and an individual located in Gaza, known as Abu Ahmed, had been mistakenly been described as a conversation between Mr. Fariz and a Specially Designated Terrorist, Abd Al Aziz Awda (Awda). The affidavit describes, repeatedly, that Awda is a Specially Designated Terrorist, the Spiritual Advisor of the Palestinian Islamic Jihad (PIJ) and, as such, an individual with whom financial transactions were illegal and through whom an individual may not provide material support to the PIJ. As is made clear by the affidavit’s repeated reference

¹The government repeatedly refers to Agent Myers’ erroneous affidavit as one of misidentification as opposed to a misstatement. Were the misstatements mere renditions of conversations between misidentified speakers, such a characterization may be appropriate. Here, however, the agent not only misidentifies the speaker but compounds the error by describing the legal significance of the individual’s identify and draws legal conclusions concerning the effects of such a conversation.

to Awda and his designation, it was the individual and his designation which supported the inference of illegality and, therefore, probable cause. The materiality of the misstatement is apparent from its significance within the affidavit itself.

The government argues that Hatem Fariz has failed to make a concrete showing that the affiant deliberately or recklessly included false statements. They argue that the affiant's mistakes are innocent and understandable. Its arguments are at best contradictory and at worst, misleading.

The government attempts to demonstrate why the affiant's malfeasance is forgivable. It blames the misstatements on the Chicago office of the FBI; it blames the misstatements on the sheer nature of an investigation proceeding over the course of a decade, including dozens of orders for interception of communications under the Foreign Intelligence Surveillance Act wherein most communications occurred in Arabic; and it blames the prominence of the use of "Abu" names would necessarily result in an innocent mistake. Notably, the government doesn't deny the affiant's knowledge of the information found in the telling CIPA disclosure. Doc. 683

What the government fails to explain in its vain attempt at justifying its failures is why, given the nature of the investigation, the lead or any other agent failed to recognize the import of Awda's joining forces with the Palestinian Authority. The Palestinian Authority, tasked with security within the West Bank and Gaza, opposes the efforts of the PIJ and other allegedly militant resistance organizations within Palestine. Had the affiant been aware of this elementary fact, he would have immediately questioned any

translator's identification of the speaker in the May 26, 2002 telephone call as Awda, particularly as it would have pertained to PIJ activities. In the same vein, the affiant failed to describe how this SDT managed then and now to live open and notoriously in Gaza, by some accounts less than a block from an Israeli checkpoint.

The government says, quite simply, that these guys used a lot of "Abu" names. The use of the term "Abu" by Arab Muslims is again elementary. To say one was fooled by the use of the term "Abu" is akin to saying one was fooled by the use of common English terms such as Mrs, Doctor or Judge. Abu is a common term of respect generally referencing an individual's eldest son. The argument that an experienced agent would be confused by such terminology underscores the vapidness of the government's position.

Finally, the government responds with an argument it considers a coup de grace. It notes that the most recent version of the Office of Foreign Assets Control List of Specially Designated Nationals and Blocked Persons: includes "Awda, Ab Al Aziz, Chief Ideological Figure of PALESTINIAN ISLAMIC JIHAD-SHIQAQI; DOB 1946 (individual)[SDT]." The government states that "the credibility and weight of this evidence far outweighs any minimal significance of Document 683." This same weighty document also lists the name of SHAQAQI, Fathi; Secretary General of PALESTINIAN ISLAMIC JIHAD-SHIQAQI (individual)[SDT]. Fathi SHAQAQI was killed in October of 1995. Doc. 1, O.A. 181.² If as the government asserts, the affiant relied on this

²Moreover, neither Abu Ahmed a/k/a Salah Abu Hassanein (misidentified as Abd Al Aziz Awda in the original indictment and affidavit in support of the instant search warrants) nor the

document as superior to its own intelligence, the affiant's intention must be clear: to mislead the Court as it undertook to evaluate the appropriateness of suspending an individual's constitutional protections.

Non-Excised Affidavit: Probable Cause

The remainder of the affidavit, as described in consists of purely conclusory statements, i.e. "defendant AL-ARIAN turned to defendants HAMMOUDEH, FARIZ and BALLUT to run the PIJ operation in the United States..." (Page 34 of 113 of Myers affidavit) and/or "defendants SAMI AL-ARIAN, SAMEEH HAMMOUDEH, HATIM NAJI FARIZ, GHASSAN ZAYED BALLUT, BASHIR NAFI and others continued to engage in PIJ fund-raising and support activities in a manner designed to conceal the nature of what they were doing and the source and recipients of the support." (Page 35 of 113 of Myers affidavit). In the absence of the affiants' repeated references to the PIJ being at the heart of the allegations within the affidavit and indictments, the activities described are otherwise unremarkable. They describe conversations between individuals frequently targeted by the press and public for ridicule and resentment. The conversations contained therein reflect one point of view from an individual apparently unwilling to learn the most rudimentary features of Arab Muslims' daily life. It ignores the effect of a family member and friend having been incarcerated for years on end without the benefit of due process. It ignores the superficial response of a country to

charitable organization alleged to have been the recipient of monies from Hatim Fariz are now or have ever been listed as SDTs or Foreign Terrorist Organizations.

world events, and mirrors the opinions of individuals who blindly attribute any act of terrorism to Arab Muslims.

Notwithstanding the government's peculiar request that this Court reconstruct the fallible affidavit with information that was apparently not developed until after the search and therefore could not have been used as the basis for determining probable cause, the remaining, accurate and non-conclusory provisions of the affidavit in support of the search warrants attributable to Hatem Fariz fail to establish requisite probable cause. The affidavit having failed to establish probable cause, the search warrant is equally invalid and the fruits of the search must necessarily be suppressed.

Defendant's Statements

Counsel for Hatem Naji Fariz agree that no incriminating statements were made by Mr. Fariz during the searches. However, should a statement attributable to Mr. Fariz and the subject of these unconstitutional searches arise, they too should be suppressed as fruit of the poisonous tree.

Factors Governing the Reasonableness of the Search

The reasonableness of the search is best reflected by the extent to which it is shown to be utilized. The items described in Mr. Fariz's Motion to Suppress reflects a sampling of those items which could have no evidentiary value but were seized all the same. The nature of the search reflects the lack of attention to detail exercise from the drafting of the affidavit to its execution.

Conclusion

As previously stated, the mandate of *Franks* has not been diluted with any claimed good faith exception. “Suppression . . . remains an appropriate remedy if the . . . judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or could have known was false except for his reckless disregard for the truth.” *United States v. Leon*, 468 U.S. 897, 923 (1984). Moreover, in this Circuit, there is a recognized federal right to be free from those prosecutions which are procured through false or misleading information. *Strength v. Hubert*, 854 F.2d 421 (11th Cir. 1988).

Mr. Fariz submits that, absent the misstatements and omissions in the affidavit, there was insufficient probable cause for the issuance of a search warrant.

In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Franks, 438 U.S. at 156.

WHEREFORE, the Defendant, Hatem Naji Fariz, respectfully asks this Court to suppress all evidence seized and all statements made by him on the date of the search or, in the alternative, grant an evidentiary hearing on the matter.

Respectfully submitted,

R. FLETCHER PEACOCK
FEDERAL PUBLIC DEFENDER

/s/ Kevin T. Beck

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22th day of November, 2004, a true and correct copy of the foregoing has been furnished by CM/ECF, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Cherie L. Krigsman, Trial Attorney, U.S. Department of Justice; William Moffitt and Linda Moreno, counsel for Sami Amin Al-Arian; Bruce Howie, counsel for Ghassan Ballut; and to Stephen N. Bernstein, counsel for Sameeh Hammoudeh.

/s/ Kevin T. Beck
Kevin T. Beck
Assistant Federal Public Defender